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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois (William J. Scott, Attorney General), Illinois Commerce Commission, and United Transportation Union (John W. McGinness), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 16, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in Appendix A. (App. 1a-16a).

The decision of the Interstate Commerce Commission ("I.C.C.") is reported as *Illinois Central Gulf R. Co.-Abandonment,* 354 I.C.C. 448 (1977), and reproduced in Appendix B (App. 20a-28a). A further order of the I.C.C., amplifyinging its earlier determination, is reproduced in Appendix B. (App. 29a-39a). The I.C.C. denied plenary consideration. (App. 40a-41a).

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1979. (App. 17a). The order denying rehearing was entered June 5, 1979. (App. 18a). On June 14, that court stayed issuance of its mandate until July 13, 1979, pending petition for writ of certiorari. (App. 19a). The jurisdiction of the Supreme Court is confered by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court reviewing an I.C.C. railroad abandonment decision may accept the explanation of counsel in lieu of various agency findings, and the court thereafter impose its own condition to the exercise of the agency order.

STATEMENT

This proceeding was instituted directly in the Court of Appeals to challenge the I.C.C.'s approval of a 36-mile abandonment of railroad in southern Illinois. The line extends in a north-south direction between Murphysboro and Elco, and is operated by Illinois Central Gulf Railroad Company ("ICG").[1] It is a segment of the former Gulf Mobile &

[1] The abandonment technically is between Milepost 554 and Milepost 518. See sketch attached to court's opinion. (App. 16a).

Ohio Railroad Company main line between East St. Louis and Cairo, Ill.[2]

There are two other railroad abandonment applications pending in the area. One embraces the Missouri Pacific Railroad Company (former Chicago & Eastern Illinois Railroad Company) line between Fayville Junction and Joppa Junction, which intersects with ICG's East St. Louis-Cairo line at Tamms. The Missouri Pacific segment is part of its operation between Thebes and West Frankfort, by way of Olive Branch, Tamms, and Marion, Illinois. (App. 3a).

The other abandonment application involves the proposed abandonment by ICG of a 14.5-mile segment in the Marion, Illinois area. Both of these other abandonments are the subject of review proceedings instituted in the Court of Appeals for the 7th Circuit.[3]

The railroads serving the U.S. Midwest have instituted a wave of abandonment proceedings at the I.C.C. In a May, 1977 compilation, some 10.9 percent of the entire railroad mileage in the State of Illinois was listed by the railroads as subject to abandonment. The state impacts are shown below; they are even more severe in neighboring states:[4]

[2] The Illinois Central-Gulf, Mobile & Ohio merger became effective in 1972.

[3] The Missouri Pacific abandonment is No. 78-1710 (filed June 2, 1978). The case has been reopened for further consideration by the I.C.C. (App. 7a). The other ICG abandonment is No. 79-1005 (filed January 3, 1979).

[4] See: Traffic World, Vol. 170, No. 8, p. 15 (May 23, 1977).

STATE IMPACTS

State	Miles	Total Miles (1974)	Percent Aband.
Iowa	1,437	7,587	18.9
Minn.	1,133	7,366	15.4
S.D.	1,520	3,351	45.4
Mo.	736	6,062	12.1
Ill.	1,149	10,573	10.9
Mich.	1,136	5,965	19.1
Wis.	1,210	5,808	20.8

The I.C.C. in April, 1978, issued a proposed policy statement and proposed revision of regulations to cope with the interrelationships among related abandonments. The agency proposed that if two or more abandonment applications are pending which involve service to the same communities or territory, the proceedings would be consolidated. Ex Parte No. 274 (Sub-No. 2)A, *Identification and Handling of Related Rail Abandonment Applications*. 43 Fed. Reg. 15754 (April 14, 1978).

The railroads generally have opposed the consolidation of neighboring abandonment cases, and there has been no word from the agency since the April 14, 1978 publication, and the submission of comments. As noted by the court of appeals, the new rules have not become effective. (App. 12a).

The Proceedings Below

Petitioners sought to have the I.C.C. consolidate the three related abandonment cases, but the I.C.C. elected to decide each case independently. (App. 22a, 25, 29a-31a). The instant Murphysboro-Elco abandonment was the first to be

approved, and the first to be reviewed by the court of appeals. In the absence of agency findings as to the interrelationships between the three abandonments, the court of appeals attempted to fashion findings by questioning counsel for the I.C.C., and also by questioning counsel for intervening railroad, ICG. The court concluded by imposing its own condition upon the exercise of the abandonment authority, and affirmed the agency order as so judicially conditioned.

The issues for which the court of appeals sought explanation from counsel were (1) the adequacy of the finding that traffic movements would likely increase over the ICG line involved, and (2) whether service could be instituted from Cairo without a special agreement with the United Transportation Union, and if such is necessary, whether the added costs of such an agreement should have been considered by the I.C.C. in determining the propriety of abandoning operations south from Carbondale over the Murphysboro-Elco segment.

The background leading up to this situation is fairly simple and uncomplicated. The Murphysboro-Elco segment is served by a train operating south from Carbondale. There is industry situated at Elco and Tamms, but no industry on the line between Cairo and Tamms. The last train operated over the Cairo-Tamms segment in June, 1974. (App. 3a). If ICG is permitted to abandon the Murphysboro-Elco segment of its line, the railroad then proposes to continue service to industry in the Elco-Tamms area by means of reinstating train operations north from Cairo to Elco. See sketch in court's opinion. (App. 16a).

1. The I.C.C. in approving abandonment of the Murphysboro-Elco segment, made the typical finding as to lack of prospect for future increased traffic over the line. (App. 38a):

> . . . . that there is no substantial showing that actual traffic movements over the segment will increase in the foreseeable future.

However, the I.C.C. subsequently found in its report in the Missouri Pacific abandonment case, which was issued in March, 1978, after the decision in the ICG's Murphysboro-Elco case, that upon abandonment of the Missouri Pacific line through Tamms, the major silica shipper located at Tamms would shift his traffic to ICG at Tamms. This subsequent finding in the Missouri Pacific abandonment case, contradicted the finding in the Murphysboro-Elco case as to the prospect for future traffic increase.

2. In addition to the contradictory findings concerning prospects for increased freight traffic, there was also the matter of restoring service north from Tamms over a line which had not seen an ICG freight train since June, 1974. The added costs which would be occasioned for such rehabilitation of line and, in particular, the cost of a special labor agreement with the United Transportation Union because operation north from Cairo would cross seniority lines established as a result of the I.C.-GM&O merger, were not addressed by the I.C.C. in its agency decision, although pressed at every point by the Union. The I.C.C. recited that Mr. Ben W. Norton, General Chairman for the United Transportation, submitted testimony (App. 21a), but the I.C.C. was silent as to any of his uncontradicted testimony, which showed:

> "It is my understanding from Mr. Burch's statement that the major silica plant at Elco would be serviced from Cairo. This would require a special labor agreement with the U.T.U., because the former GM&O line between East St. Louis and Tamms, and the former I.C. line between

> Centralia and Cairo line are in Seniority District No. 3, whereas the former GM&O line between Tamms and Cairo is in Seniority District No. 4. At present, I.C.G. has not instituted negotiations for an agreement on my part for service north from Cairo.
>
> "Current I.C.G. operations at Cairo are performed by two former I.C. switch crews. It would be necessary to establish another train or switch assignment for I.C.G. to service Tamms and Elco from Cairo. The volume of business, and the 21 mile distance, cannot be performed by existing assignments.
>
> "In my opinion, it is an error in management judgment to abandon the Murphysboro-Elco line in favor of service resumption over the Tamms-Cairo line. Crew expenses would be increased over present levels, and the traffic at intermediate points between Elco and Murphysboro would be sacrificed, and the public inconvenienced." (V.S. Norton, Second Supplemental Appendix, pp. 16-17).

Thus, the uncontradicted evidence showed there would be serious cost problems if operations were reinstated north from Cairo, and in opting for such service resumption in the stead of operations over the Murphysboro-Elco segment, the I.C.C. had proceeded without adequate findings.

The Court's Decision

The Court of Appeals dealt with the challenge caused by the prospect for added traffic flowing over the Murphys-

boro-Elco segment, occasioned by the I.C.C.'s subsequent approval of the Missouri Pacific abandonment at Tamms, through questioning I.C.C. counsel, who stated that the agency did give consideration to the Missouri Pacific abandonment, and that it considered the service from Cairo to be a satisfactory routing. The Court of Appeals accepted appellate counsel's explanation. (App. 10a-11a):

> Petitioners second argument in favor of consolidation is that a material finding supporting this abandonment is inconsistent with a finding in the Mo-Pac abandonment. The allegedly inconsistent finding is that there was no substantial showing that actual traffic movements over the segment here in question will increase in the near future.
>
> Petitioners argue that this finding is contradicted by a finding in the MoPac report and order which contemplates that a silica plant on the abandoned MoPac line will shift its traffic to ICG. At oral argument, the ICC counsel, in response to questioning from Judge Tone, stated that the Commission did give consideration to the MoPac abandonment and that it considered the service from the south, i.e., the Tamms-Cairo line, to be a satisfactory routing for any additional traffic from Mo-Pac. We find this to be sufficient explanation of the allegedly inconsistent findings.

The Court of Appeals next filled the gap in the I.C.C.'s report regarding the feasibility of resuming service north from Cairo, by receiving assurance from ICG counsel that a new labor agreement would not be required. The court affirmed the I.C.C.'s abandonment order contingent upon the restoration of service to Tamms and Elco via Cairo. (App. 15a):

> Finally, at oral argument, counsel for Intervenor ICG assured the court that restoration of service from Cairo to Elco could be accomplished without the acceptance of any new labor agreement with the United Transportation Union. With that assurance in mind, the order of the ICC is affirmed, and the abandonment may proceed, contingent upon the restoration of service to Tamms and Elco via Cairo.

REASONS FOR GRANTING THE WRIT

THE DECISION CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT ON FEDERAL ADMINISTRATIVE LAW.

There are many I.C.C. abandonment decisions undergoing review in the court of appeals, and it is anticipated that even more will be filed flowing from the present railroad movement toward major line abandonments.

1. The court of appeals concluded to accept appellate counsel's explanations so as to supply missing agency findings. This use of counsel's statements is open and appears on the face of the decision. (App. 10a-11a, 15a) Moreover, such reliance resulted in erroneous findings.[5]

---

[5] The error in the I.C.C. counsel's rationalization is patent, because the Missouri Pacific abandonment case was decided by the I.C.C. a considerable period *after* the agency had issued its decision allowing the instant ICG abandonment. The error in the ICG counsel's statement is not patent on its face, but lacks any agency record support whatsoever.

It is fundamental that a reviewing court must judge the propriety of agency action solely by the grounds invoked by the agency. If the grounds are inadequate, the court should not substitute its own findings. *Securities Com'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The prohibition against appellate counsel's *post hoc* rationalizations is long-standing. *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 443-44 (1965):

> ". . . courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . ." (citations omitted). For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'". (citation omitted).

See also: *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1963); *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974).

Here, the Court of Appeals relied upon counsel, rather than agency findings, for material deficiencies in the agency report.

2. The decision likewise patently violated rulings of this court with respect to judicial modification of the agency order. Here, the court of appeals not only accepted the assurance of ICG counsel that a new labor agreement was not required, but affirmed the agency order contingent upon the restoration of service to Tamms and Elco via Cairo. (App. 15a) It is settled that a reviewing court cannot itself condition an

agency order. *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Arrow Co. v. Cincinnati N.O. & T.P.R.*, 379 U.S. 642 (1965); *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966); *FCC v. National Citizens Com. for Broadcasting*, 436 U.S. 775, 792-93 fn. 15 (1978);

3. The conflict between the decision below and settled decisions of this court is a proper ground for granting certiorari. *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case. Cf. *Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949).

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

April 16, 1979
(Argued December 1, 1978)

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

No. 77-1953 vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,

and

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervening Respondent.

On Petition for Review of an Order of the Interstate Commerce Commission.

No. AB-43 (Sub-No. 16)

ORDER

The State of Illinois has filed this petition to review, and to set aside and to remand, an order of the Interstate Com-

* Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana, sitting by designation.

merce Commission (ICC) which authorizes the intervening respondent, Illinois Central Gulf Railroad Company (ICG) to abandon a 36-mile segment of its line in Southern Illinois.

By application filed 19 January 1976, in Docket No. AB-43 (Sub-No. 16), the ICG sought a certificate of public convenience and necessity under Section 1(18)-(20) of the Interstate Commerce Act (49 U.S.C. § 1(18)-(20))[1] permitting abandonment of a segment of its line of railroad extending from milepost 554 south of Murphysboro, Illinois, to milepost 518 north of Elco, Illinois, a distance of 36 miles (the Murphysboro-Elco segment).

The Commission set the proceeding for hearing under its modified procedure, wherein all the evidence is submitted through written "verified" statements.

Initial and reply verified statements were filed by ICG, while a joint verified statement was filed by the protestants who are the same parties as petitioners herein. After consideration of the evidence, Review Board No. 5 found that the "present and future public convenience and necessity permit the abandonment" of the Murphysboro-Elco segment.

The protestants appealed the Review Board's Report and Order to Division 3 of the Commission. By order served 21 December 1977, Division 3, acting as an Appellate Division, affirmed the findings and conclusions of the Review Board in all respects, except that the labor protective conditions prescribed were "amplified".

[1] Recent amendments affecting rail abandonments contained in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") are of limited application to this proceeding. Only those sections relating to federal subsidy (49 U.S.C. § 1a (6) and (7)) are made applicable to applications pending at the time of the amendments (section 1a (8)).

An attempt to secure review by the full Commission failed when the Commission declined to find that an issue of general transportation was invovled. The denial order did point out that the labor protective conditions imposed would be subject to any modification ordered in a pending proceeding, *Oregon Short Line R. Co. Abandonment-Goshen*, 354 I.C.C. 76 (1977).

After filing their petition for review in this Court, a stay by the Commission, of its order authorizing the abandonment, was sought and granted by the Commission.

The Murphysboro-Elco segment extends 36 miles in a north-south direction from a point just south of Murphysboro, Illinois, to a point just north of Elco, Illinois. It is part of an ICG line of railroad extending through the towns of Elco and Tamms, to Cairo, Illinois, on the south. This segment is presently served once a week by a local freight train operating from Carbondale, Illinois. At Tamms, interchange was effected, until some time in 1976, with the east-west line of the former Chicago & Eastern Illinois Railroad Company, now the Missouri Pacific Railroad Company (MoPac), which operates between Thebes and West Frankfort, Illinois, by way of Olive Branch, Tamms, Joppa Junction and Marion, Illinois. The last service provided by ICG over its line from Tamms to Cairo was terminated in June 1974.

Another ICG line runs parallel to the Murphysboro-Elco segment and this line also serves Cairo. Use of the common point of Cairo would permit ICG to continue rail service at Elco and Tamms to both southerly and northerly points. As an aid to a better understanding of the area and the lines involved, we incorporate, as Appendix "A" hereto, Exhibit 1 attached to petitioners' opening brief.

Evidence was offered by the parties concerning the traffic on the Murphysboro-Tamms-Cairo line, alternative transportation, the financial return from operation of the segment here in question, the present condition of the line, the cost to rehabilitate the line, and the shipper and public sentiment regarding the proposed abandonment. During the years 1974, 1975 and 1976, traffic which originated and terminated at the seven stations on the Murphysboro-Elco segment amounted to 3, 30 and 21 carloads respectively. The only industry on the line is located at Jonesboro and the Jonesboro station was the only one on the segment receiving or sending traffic in the year 1976.[2]

In 1970 Jonesboro had a reported population of 1,676; two of the stations had no population reported, and the remainder reported populations of 78, 100, 150 and 314.

Current operations of the line produced losses of $40,639 in 1974; $33,371 in 1975; and $6,245 in 1976. The condition of the line has suffered from deferred maintenance. The last tie renewal program was approximately 15 years ago and there is an average of 1,200 totally deteriorated ties per mile. The right of way is overgrown with brush. The cost of rehabilitation of the line was estimated to be $777,600. The amount of subsidy required for continued operation of the segment was estimated to be $1,174,429. The estimated net salvage value to ICG of the rail and other track materials is $2,158,396.

With respect to shipper sentiment regarding the abandonment, the Review Board stated:

---

[2] Jonesboro is located one mile from the station at Anna, Illinois, on the ICG line running parallel to the Murphysboro-Elco segment. Jonesboro and Anna are both on Illinois State Highway N 146.

> Protestants have not submitted testimony from a single shipper served by the track to be abandoned which states that there is a need for the rail service or that such shipper would be hurt by the abandonment.

The only verified statement in opposition was filed by petitioners herein, the State of Illinois, the Illinois Commerce Commission and the United Transportation Union. The only local sentiment in opposition was contained in unverified letters included in petitioners' statement. Letters from the Board of County Commissioners of Union County and the superintendent of the Jonesboro Community Consolidated Schools contained generalized statements in support of continued service.

The sole shipper represented, Illinois Minerals Co., was not located on the segment to be abandoned, but at Elco, south of this segment. In that shipper's letter, included in petitioners' statement, he states his understanding that his Elco mill will now receive cars from Cairo for loading and will return loaded through Cairo to other ICG lines. He further states that, "The proposed method of handling our carload shipments will be satisfactory to us, but we write . . . because of an apprehension we have that . . . the proposed abandonment . . . will be followed, in a few years, by another proposed abandonment . . ."

The carload traffic initially supplied by ICG included only traffic generated by stations on the Murphysboro-Elco segment, i.e., cars that had been loaded and unloaded at points on the segment. There was additional traffic that had traveled over the segment from points north and south of the segment. This "bridge" traffic was not included by ICG because this traffic would continue to be carried by

ICG over an alternative route following abandonment. An example of this is the Illinois Minerals Company traffic from Elco, described above.

The Commission's Subpart B abandonment application[3] calls for "a list of all freight carloads moved by the applicant *over* the abandonment trackage during the preceding 12 months . . ." (Emphasis supplied.) 49 C.F.R. 1121.21(d). In response thereto ICG submitted the 1976 carloads data in its reply verified statement filed 6 June 1977. In 1976, 772 cars were handled "over" the trackage to be abandoned, including the 21 cars originating at, or destined to, points on the Murphysboro-Elco segment.

In its decision, the Review Board considered the evidence of bridge traffic as serving two functions. The first was in relation to the "ultimate decision" on the basis of public convenience and necessity; the second function was to permit application of an ICC rule which created a rebuttable presumption that, because of a minimal amount of railcar traffic, the public convenience and necessity does not require maintenance and/or continued operation of a portion of a line of railroad. 49 C.F.R. §§ 1121.21(d) and 1121.23. Application of this presumption shifted to the protestants the burden of going forward with the evidence of need for the continued operation of the segment here in question.

In affirming the Review Board, Division 3 of the Commission summarized its conclusion on the issue of public convenience and necessity:

---

[3] The Commission order served 1 March 1977 directed ICG to supply the information required by Subpart B, "Special Rules for Railroads Proposing Abandonments Where the Requirements of Public Convenience and Necessity are Minimal or Nonexistent." Subpart B appears at 49 C.F.R. 1121.21-1121.24 (1976 Fd.).

> The evidence in this proceeding shows a line of track in poor condition which has very minimal car movements, that the revenue obtained from such movements is miniscule given the cost of maintenance and rehabilitation, that constant deficits have been incurred on the line and that there is no substantial showing that actual traffic movements over the segment will increase in the foreseeable future. The Board's finding that public convenience and necessity permit the proposed abandonment was therefore in order.

As part of their "Statements in Opposition" filed 16 May 1977, in response to the Commission's modified procedure order, petitioners requested that two pending rail abandonment proceedings[4] be consolidated with this proceeding. Each of these proceedings had been previously consolidated with other different proceedings.

In neither of the cases proposed for consolidation does the trackage to be abandoned have a common point with the Murphysboro-Elco segment. The one line to be abandoned crosses the ICG line south of the Murphysboro-Elco segment at Tamms, approximately four miles south of Elco. By order of 26 December 1978, the ICC has reopened that proceeding for further consideration.

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[4] These are Docket No. AB-11, Chicago & Eastern Illinois Railroad Company – Abandonment Between Joppa Junction and Fayville Junction, Illinois, filed 27 November 1972, and Docket No. AB-43 (Sub No. 27), Illinois Central Gulf Railroad Company Abandonment Between Sealy and Mande in Williamson County, Illinois, filed 14 October 1976.

The other application involved a proposed abandonment by ICG of a 14.5 mile segment of line. Its nearest point is approximately 14 miles from the northern end of the Murphysboro-Elco segment. From this point, it runs easterly away from the Murphysboro-Elco segment, terminating at Marion, Illinois. The reason given by petitioners for seeking consolidation of this proceeding is that the train crew which serves that Murphysboro-Elco segment on certain days of the week also serves the line to Marion on other days.

The review Board denied the request for consolidation, finding that the issues were not closely related to those of the instant proceeding, and finding no justification for further delay of a decision in the case before it. Division 3 affirmed and stated that "the Board was clearly correct in exercising its discretion as it did."

The issues before this court may be stated thusly:

(1) Whether the ICC abused its discretion in denying petitioners' request to consolidate this proceeding with two other abandonment applications; and

(2) Whether the ICC's interpretation of its "34-carload" rule is reasonable.

The statutory test prescribed in abandonment proceedings by Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), is whether the present or future public convenience and necessity permit the abandonment. *Colorado v. United States*, 271 U.S. 153, 168 (1926). The interpretation of the undefined term "public convenience and necessity" is left by Congress to the sound discretion of the Commission. *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945). In this connection, the Act contemplates that in abandonment proceedings the Commission will make a considered balance of the respective conflicting interests in its

efforts to decide what fairness to concerned parties demands. See, e.g., *Colorado v. United States, supra*, 271 U.S. at 167-168. More specifically, the Commission's function in abandonment proceedings is to balance "the immediate and local interests of the community and the shippers against the broader public interest in freeing interstate commerce from undue burdens." *State of Nebraska v. United States*, 255 F.Supp. 718, 721 (D.Neb. 1966).

Applicant ICG demonstrated the burden on interstate commerce by showing that the Murphysboro-Elco segment generated very little traffic (3, 30 and 21 cars in 1974, 1975, 1976), that the segment was operating at a continuing loss, and that there was need for substantial rehabilitation expense if the line were to continue operating. The effect of abandonment on the few shippers on the line was shown to be minimal, with the consequence that there was no objection by any shipper on the segment to be abandoned. We find that the Commission properly exercised the balancing function required by *Colorado* and *State of Nebraska* and that its determination to permit the abandonment is supported by substantial evidence.

The *Consolidation Issue*

Consolidation of hearings or refusal to consolidate hearings lies within the administrative discretion of the Interstate Commerce Commission. *American Trucking Ass'ns v. United States*, 326 U.S. 77, 83 (1945). *See, e.g., Federal Communications Commission v. WJR*, 337 U.S. 265, 283 (1949); *Railway Express Agency, Inc. v. United States*, 205 F.Supp. 831, 834-835 (2nd Cir. 1962). *See also, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., et al.*, 98 S.Ct. 1197, 1202 (1978). In *Association of Massachusetts Consumers, Incorporated v. United States Securities and Exchange Commission*, 516 F.2d 711 (D.C. Cir.

1975) *cert. denied,* 423 U.S. 1052 (1976), a sound principle of administrative law was restated:

> No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems whenever related applications are pending at the same time. Consolidation * * * and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts.

See also 1 K. Davis, *Administrative Law Treatise* § 8.12, at 572-73 (1958).

Petitioners argue that the *American Trucking case, supra,* weighs in favor of consolidation because, as petitioners state, "The Court strongly suggested consolidation upon remand." In reality, the Court stated, "It may be that in the light of certain evidence the Commission may wish to consolidate hearings on the applications, but that is a matter for administrative discretion." 326 U.S. 77, 83. Petitioners' reliance on *American Trucking* is misplaced. As detailed below, no abuse of discretion has been shown.

Petitioners list four arguments in favor of consolidation. First, petitioners argue that consolidation would not have caused undue delay, but the ICC responds by contending that consolidation of the three applications would have involved rescheduling or reopening of hearings and such would have conflicted with the need to expedite processing of its voluminous case load. We agree. We find that no abuse of discretion regarding the ICC's refusal to consolidate on the basis of possible undue delay.

Petitioners' second argument in favor of consolidation is that a material finding supporting this abandonment is

inconsistent with a finding in the MoPac abandonment. The allegedly inconsistent finding is that there was no substantial showing that actual traffic movements over the segment here in question will increase in the near future. Petitioners argue that this finding is contradicted by a finding in the MoPac report and order which contemplates that a silica plant on the abandoned MoPac line will shift its traffic to ICG. At oral argument, the ICC counsel, in response to questioning from Judge Tone, stated that the Commission did give consideration to the MoPac abandonment and that it considered the service from the south, i.e., the Tamms-Cairo line, to be a satisfactory routing for any additional traffic from MoPac. We find this to be sufficient explanation of the allegedly inconsistent findings.

Petitioners' third contention is that the ICC is missing the point when it denied consolidation on the ground that Tamms would have continued service even if both applications are granted. It is argued that the need for consolidation is not based upon continued service by ICG at Tamms alone, but arises because of the type of service at Tamms which would result by operation from Cairo rather than from Carbondale, and the duration of such service in light of the projected deficit of that Cairo-Elco service. The ICC contends, and we agree, that the only potentially significant question left unanswered is the amount of deficit ICG may incur on the Cairo-Elco segment. The estimated deficit submitted to the ICC did not take into account any additional traffic from the MoPac abandonment, which may conceivably eliminate the deficit. In any event, the deficit originally projected is relatively minor compared to the projected deficit on the Elco-Murphysboro segment if it is required to continue in operation. The petitioners have not presented any substantial evidence indicating a likelihood of the ICC's permitting the ICG, at some future date, to abandon

the Cairo-Elco segment. We fail to find an abuse of discretion by the ICC in considering the type of service contemplated at Tamms.

Petitioners' fourth contention in support of consolidation is that a recent ICC policy statement, published in the 14 April 1978 issue of the Federal Register, is an accurate reflection of the law requiring consolidation for the reason that consolidation is required in cases where service to the same community is effected. Petitioners admit that this recent policy statement is not yet effective. Although we may speculate as to whether these proceedings would be consolidated under this new policy, we cannot find an abuse of discretion on the part of the ICC for failing to follow an as yet inapplicable policy statement.

The "34-Carload" Rule

Petitioners present two arguments to support the assertion that the ICC incorrectly utilized the "34-Carload" rule.[5] 49 C.F.R. 1121.23 (1976 Ed.). First, petitioners suggest that the three-judge panel in *Pennsylvania v. United States,* 361 F.Supp. 208 (M.D. Pa. 1973), *aff'd per curiam* 414 U.S. 1017, construed the "34-carload" rule as applicable only in situations where the proceeding was not assigned for oral hearing or modified procedure. Petitioners reason that because the case at bar was assigned for modified procedure, it was error for the ICC to apply the "34-carload" rule. The sole support for petitioners' contention that the rule is

[5] This rule provides for a rebuttable presumption that the public convenience and necessity permit abandonment of a line of railroad when fewer than 34 carloads of freight per mile are carried over the trackage to be abandoned during the 12 months preceding the filing of the application.

of no effect when the modified procedure is used in the following quotation from *Pennsylvania:*

> The rebuttalbe presumption merely permits the disposition of the case on the record without formal proceedings when substantial evidence is not proffered by opponents of the abandonment. 361 F.Supp. at 218.

This statement does not touch on the question of the existence of the presumption when modified procedure is conducted. We are convinced that the *Pennsylvania* case does not hold that the presumption disappears when the abandonment is set for modified procedure. In fact, the *Pennsylvania* court upheld the validity of the ICC's abandonment regulations, including those in question here:

> They [plaintiffs] fear that the Commission, because it has erected the rebuttable presumption, will thus be able to deem any public objection insubstantial, and in effect, grant the application on a mere showing of light traffic.
>
> We do not interpret the new I.C.C. rules to make possible such a result. As we have already emphasized, the Subpart B and C procedures do not dispense with the necessity for the Commission to weigh the relative burdens; nor do they change the traditional rule that an infinite variety of circumstances may be included in the weighing process; nor will the denial of formal proceedings allow the I.C.C. to therefore ignore the record; nor will the new rules alter the standard of review in judicial challenges.

261 F.Supp. 208, 218. Thus the *Pennsylvania* court reaffirmed the holding that regardless of the use of any burden-

shifting presumptions, the ultimate test that the ICC must apply is a balancing of the immediate and local interests of the community and the shippers against the broader public interest in freeing interstate commerce from undue burdens. *Colorado v. United States, supra; State of Nebraska v. United States, supra.* We hold that respondents have satisfactorily applied this balancing test and have not overemphasized the "34-carload" rule.

Petitioners' second argument opposing the ICC's use of the "34-carload" rule is that the ICC should have applied 49 C.F.R. 1121.21(e) (1976 Ed.), which would have required ICG to submit information as to the bridge traffic over the abandoned track during the preceding two plus calendar years. To support this argument, petitioners have cited an earlier ICC decision[6] wherein the ICC interpreted Section 1121.21(*d*) in such a manner as to require a showing that the line to be abandoned carried less than 34 carloads over (bridge traffic) the trackage, rather than that the line failed to generate more than 34 carloads per mile. The holding of AB-3 regarding 1121.21(*d*) is quite different from petitioners' view of 1121.21(*e*), and simply fails to support their argument. In the case at bar, the ICC has made a reasonable interpretation of their regulations, such that 1976 bridge traffic was required to be reported under 1121.21(d) for the twelve months preceding the perfection of the application. ICG complied with this requirement and the data showed that approximately 21 carloads per mile were carried that year. We find no inconsistency with any prior ICC decision.

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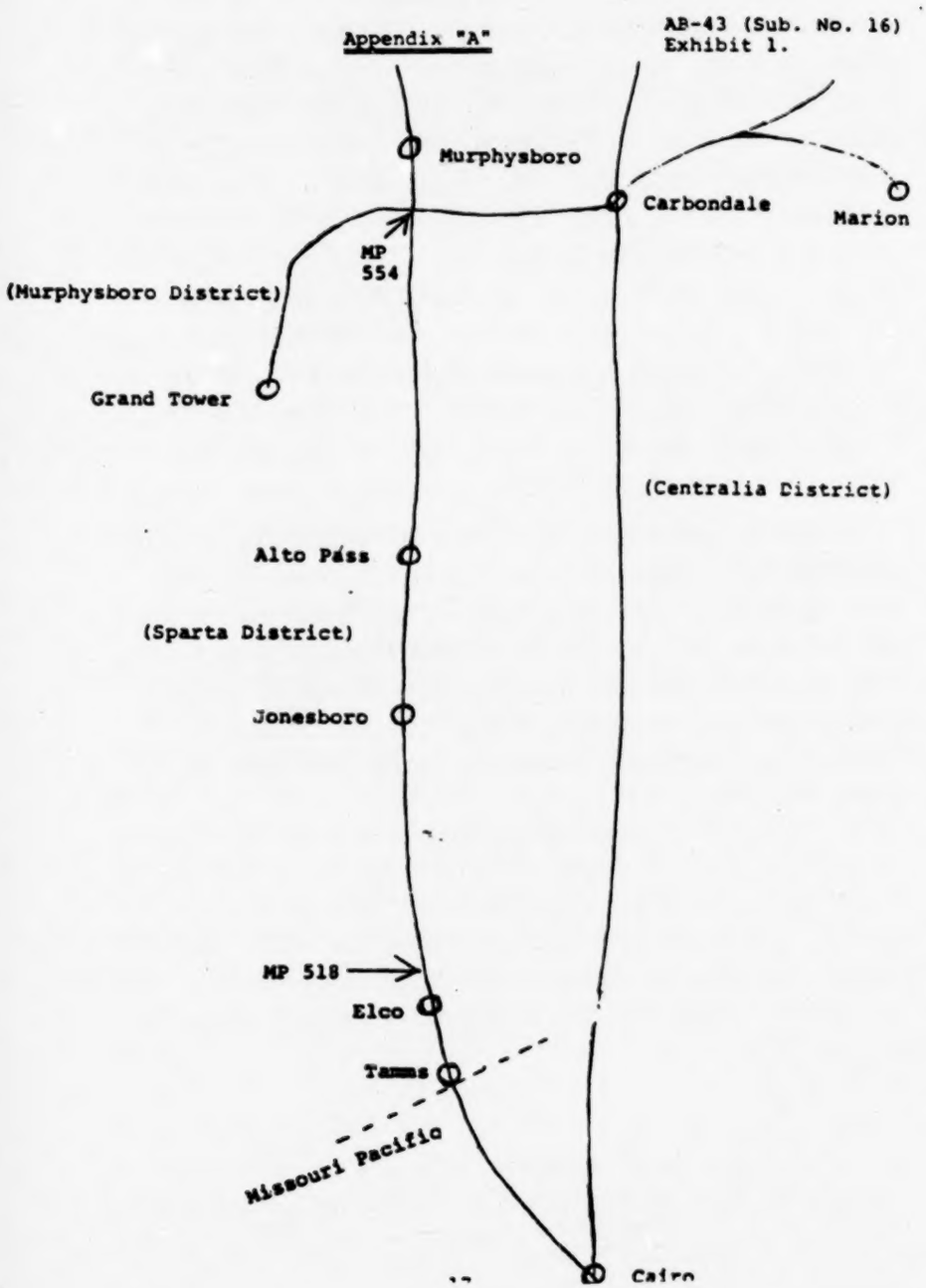
[6] Docket No. AB-3 (Sub-No. 9) Missouri Pacific Railroad Co. Abandonment between Dearin gand Dexter in Montgomery, Chautauqua and Cowley Counties, Kansas.

The third and final objection petitioners raise to the "34-carload" rule relates to the question whether 1976 was the correct year for which bridge traffic information was to be submitted. Petitioners claim that because the original application was filed on 19 January 1976, the preceding 12-month period would be 1975, a year more likely to have had higher bridge traffic. The ICC responds by pointing out a lack of prejudice in that these figures (be they 1976 or 1975 data) are used only to establish a presumption, and that the Commission's decision was not based on any presumption, but on a weighing of benefits and burdens. This court will not disturb the ICC's reasonable view that the application was not perfected until 1977, and that more recent data is preferable.

Finally, at oral argument, counsel for Intervenor ICG assured the court that restoration of service from Cairo to Elco could be accomplished without the acceptance of any new labor agreement with the United Transportation Union. With that assurance in mind, the order of the ICC is affirmed, and the abandonment may proceed, contingent upon the restoration of service to Tamms and Elco via Cairo.



Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 16, 1979.

Before

Hon. WALTER J. CUMMINGS, CIRCUIT JUDGE
Hon. PHILIP W. TONE, CIRCUIT JUDGE
Hon. ROBERT A. GRANT, SENIOR DISTRICT JUDGE*

PEOPLE OF THE STATE OF ILLINOIS,
ILLINOIS COMMERCE COMMISSION and
JOHN G. McGINNESS,
Petitioners,
No. 77-1953 vs.

Petition for Review of an Order of the Interstate Commerce Commission.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents,
ILLINOIS CENTRAL GULF RAILROAD,
Intervenor.

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Interstate Commerce Commission be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

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*Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 5, 1979.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,
No. 77-1953 vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Review of an Order of the Interstate Commerce Commission.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by petitioners, People of the State of Illinois, et al., all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 14, 1979.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and JOHN W. McGINNESS,
Petitioners,
No. 77-1953 vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents
ILLINOIS CENTRAL GULF RAILROAD,
Intervenor,

Petition for Enforcement of an Order of the Illinois Commerce Commission.

This matter comes before the court on the "MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI TO U.S. SUPREME COURT" filed herein on June 11, 1979 by counsel for the petitioners. On consideration thereof,

IT IS ORDERED that said motion is hereby GRANTED. Enforcement of this court's final order of April 16, 1979, is hereby stayed until July 13, 1979, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX B

REPORT AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5 (Members *Krock, Pohost,* and *Taylor*), held at its office in Washington, D.C., on the 20th day of July 1977.

DOCKET NO. AB-43 (SUB-NO. 16)

ILLINOIS CENTRAL GULF RAILROAD COMPANY—ABANDONMENT—BETWEEN ELCO AND MURPHYSBORO, IN ALEXANDER, UNION, AND JACKSON COUNTIES, ILLINOIS

By application filed January 19, 1976, under section 1(18) of the Interstate Commerce Act, Illinois Central Gulf Railroad Company (ICG), a common carrier by railroad subject to part I of the act, seeks a certificate of public convenience and necessity permitting the abandonment of the line of railroad from milepost 518 near Elco, Ill., in a northerly direction to milepost 455 near Murphysboro, Ill., a distance of 36 miles, in Alexander, Union, and Jackson Counties, Ill. The application was a "short form" application, filed under subpart C of the Commission's abandonment regulations, 49 CFR 1121.30-35.

In a protest filed March 29, 1976, John W. McGinness of the United Transportation Union objected to the filing under the short form procedure and requested oral hearing. On April 2, 1976, ICG filed a motion to this protest. By order served June 16, 1976, Commissioner Brown granted the motion to strike insofar as it requested refiling of the application and oral hearing.

On July 1, 1970, McGinness filed a petition for reconsideration. On July 16, 1976, ICG filed a reply to the petition. By order served March 1, 1977, Division 3, Acting as an Appellate Division, found the protests which had been filed indicated that public opposition to the proposed abandonment may be significant. The division order set the proceeding for handling under the modified procedure and directed ICG to supply all of the information in its opening verified statement normally included in an abandonment application filed under subpart B of the Commission's abandonment regulations, 49 CFR 1121.20-24.

In its initial verified statement, ICG states that it has submitted therein the full information that would be included in applications under subpart B of the abandonment regulations or under subpart A, 49 CFR 1121.1-5. ICG's statement contains an argument of counsel followed by the verified statements of five ICG employees. Witness Hardlannert, in exhibit A to this statement, lists the freight traffic originated and terminated on the line for the years 1974, 1975, and 1976, which amounted to 3, 30, and 21 carloads, respectively. ICG states that, "any overhead traffic is irrelevant, since the line proposed to be abandoned is an intermediate segment, and both the portion north of milepost 554 and the portion south of milepost 518 will remain in service, and the overhead traffic can be handled other ways." The traffic figures provided show that the line generated fewer than two carloads per mile per year, and ICG claims the information provided satisfies the subpart B regulations.

ICG's other witnesses testified as follows: The current operation of the line produced losses of $40,639 in 1974, $33,371 in 1975, and $6,245 in 1976. There is an average of 1,200 totally deteriorated ties per mile, and total rehabilitation expense for the line is estimated to be $777,600. Normalized maintenance is estimated at $126,000 per year. The net average salvage value of the track materials is estimated to be $2,158,396. The total population at the seven stations on the line is about 2,300. The only shippers on the line are located in Jonesboro which has adequate alternate transportation by truck and is located only 1 mile from Anna, a point on ICG's main line. The above, when considered with the asserted lack of potential of the area for industrial development, is alleged to prove that the public convenience and necessity do not require the continued operation of the line.

PROTESTANTS

On May 16, 1977, the State of Illinois, the Illinois Commerce Commission, and John W. McGinness filed a joint verified statement in opposition to the proposed abandonment. The statement contains an argument of counsel and verified statements of the Honorable Paul Simon, United State Congressman, and Ben W. Norton, General Chairman of the United Transportation Union.

Protestants argue that the application should be denied for failure of proof. The subpart B regulations specify that an applicant shall submit a list of all freight carloads which moved over the abandonment trackage during the preceding 12 months. Protestant

point out that ICG did not submit any information regarding "bridge" traffic which, in the case of a shipper at Elco, amounts to approximately 600 carloads per year. Through traffic moved over the line between Murphysboro and Cairo at least until June of 1974, and ICG and Chicago & Eastern Illinois Railroad Company interchanged traffic at Tamms until July 1, 1975. Thus, protestants argue that ICG has not established a prima facie case under the subpart B regulations so that the application must be denied.

Protestants also argue that ICG has failed to establish a prima facie case under subpart A of the regulations since ICG failed to show its "bridge" revenues and failed to apportion its revenues between on-branch and off-branch. On the cost side, ICG included all maintenance-of-way costs while excluding bridge revenue. Further, ICG computed its off-branch costs in accordance with the method established in Ex Parte No. 274 (Sub-No. 2) rather than the traditional 50-percent rule under subpart A of the regulations. The instant application was filed prior to the effective date of the regulations promulgated in Ex Parte No. 274 (Sub-No.2).

Protestants argue that since ICG proposes to reinstitute operations over the Cairo-Elco Line if the abandonment is authorized, the Commission should make findings regarding the economic viability of this alternate route. ICG should have submitted to pro forma statement of the expected financial results of operating over the alternate route. The cost of providing such alternate service is claimed to be an avoidable cost which ICG has not shown in its cost estimates.

Protestants request that the instant proceeding be consolidated with the proceedings in No. AB-43 (Sub-No. 27) and No. AB-11. The former proceeding covers the proposed abandonment by ICG of service between Seely and Mande. The latter proceeding deals with the Missouri Pacific Railroad Company's application to abandon its line serving Tamms. Protestants argue that the instant proceeding is closely enough related to require consolidation for decision.

Finally, protestants claim that the instant proceeding should be set for oral hearing. It is claimed that oral hearing is necessary to challenge the estimated cost of rehabilitation of the line and the claimed losses from operating the subject line.

Applicants Reply

On June 6, 1977, ICG filed its reply statement. ICG argues that there is no significant public opposition to the proposed

abandonment. Protestants have challenged the case made by ICG but have not presented evidence from shippers who use the line that there is a public need for the service.

ICG proceeds to reply to the specific challenges made by protestants. Without conceding the validity of protestants' argument that bridge traffic should be considered in this case, ICG restates its traffic evidence for 1976 to include such traffic. Including the traffic originating at or destined to Tamms and Elco, ICG carried 772 carloads over the line in 1976. This level of traffic results in an average of 21.4 cars per mile per year, so the 34-carload presumption would still be established.

ICG defends its presentation of revenues and costs associated with the line to be abandoned. Since ICG had excluded revenue from bridge traffic, it only included train expenses for those days when a train actually picked up or set out cars at points on the line to be abandoned. Again, without conceding the correctness of protestants' argument, ICG restates its 1976 revenues and costs to include the revenue from bridge traffic and the cost of all trains operated over the line.

ICG argues that use of Rail Form A off-branch costs as prescribed in Ex Parte No. 274 (Sub-No. 2) results in a much more accurate cost figure than the 50-percent rule. Further, use of the 50-percent rule is not required by the regulations so that its use herein is not mandatory.

Finally, ICG presents a pro forma cost study of the operations over the Cairo to Elco line. This study concludes that the avoidable loss from operations would be $1,392. ICG alleges that it has proven that the public convenience and necessity permit the proposed abandonment.

Motion to Strike

On June 15, 1977, protestants filed a motion to strike certain portions of ICG's reply statement. Protestants seek to have all of the exhibits attached to the reply statement of Hardlannert striken because these exhibits present new evidence, are not limited to a rebuttal of protestants' evidence, do not comply with the subpart A or B regulations since figures for only 1976 are presented, and the exhibits constitute material facts which are in dispute without affording protestants the opportunity of making a reply thereto.

On June 21, 1977, ICG filed a reply to the motion to strike. ICG argues that the exhibits in question were all prepared to answer

specific issues and questions raised by the protestants in their verified statement. Further, protestants' arguments go more toward the credibitility to be given to the evidence tendered rather than to its admissability.

Discussion and Conclusions

Before proceeding to the merits of the case, we must decide (1) the motion to strike, (2) the request for consolidation, and (3) the request for oral hearing.

Protestants claim that exhibits A, B, C, and D to witness Hardlannert's reply statement contain new evidence which is not limited to rebuttal of protestants' evidence as required by rule 49 of the Commission's General Rules of Practice. The evidence presented in exhibits A, B, and C are restatements for 1976 of traffic, cost, and revenue figures so as to include the bridge traffic carried over the line. Exhibit D is the pro forma statement of the revenue and expenses of handling traffic to Elco and Tamms via Cairo.

Since Elco and Tamms will still be served via the alternate Cairo route after abandonment, ICG concluded that the bridge traffic generated by these two points was not relevant herein. We agree with applicant as to the relevancy of bridge traffic to the ultmiate decision, since the use by a carrier of an alternate route for bridge traffic is a matter of managerial discretion, *Missouri Pac. R. Co. Abandonment*, 324 I.C.C. 357, 366, and continued operation of a line should not be required merely because of bridge traffic that can be handled as expeditiously over another route, *Gainesville Midland R. Co. Abandonment*, 267 I.C.C. 256, 262. We do not agree, however, that the information need not be submitted in this proceeding. The regulations under subpart B clearly require a listing of all traffic carried over the abandonment trackage for the preceding 12 months. Even though the traffic could have been carried over another route, it was carried over the involved line and should have been included.

This particular bridge traffic data has two functions in this proceeding. On the one hand, it can be used to formally complete a subpart B application. Its second function is that of substantive evidence to be given whatever weight deemed appropriate. The primary purpose of an administrative proceeding is to reach a fair and just decision. In that light, we note that we have before us a subpart C application and, in addition, although it was submitted

grudgingly, we have the information required to transform that original application into a subpart B application. For this decisional body to reject the information necessary to make the application whole would serve no just purposes, especially when the information bears no great weight in our decision. Thus, the motion to strike is denied with respect to exhibit A. Exhibits B and C stand in a different light. They involve the revenue and cost of the bridge traffic in exhibit A, but unlike the traffic data, this information is not required by the regulations for a subpart B application. Since it was not included in the applicant's opening verified statement and its absence was pointed out by protestants' verified statements, it may not be offered now as part of applicant's rebuttal testimony. Thus, the motion to strike is granted with respect to exhibits B and C.

Since applicant initially raised the issue of handling Tamms and Elco traffic via Cairo, and protestants questioned the viability of such an operation, exhibit D is properly admissible to rebut that challenge. Thus, the motion to strike is denied with respect to exhibit D.

We do not believe that the issues presented herein are closely enough related to those presented in docket Nos. AB-43 (Sub-No. 27) or AB-11 to justify further delay herein through consolidation for decision. The request of protestants for consolidation should be denied.

Finally, the statements submitted by the parties have developed a record which is quite sufficient for decision of the instant proceeding. We believe oral hearing to be unnecessary, and protestants' request, therefore, should be denied.

The evidence of record indicates that the line to be abandoned handled an average of less than two carloads per mile annually in 1974, 1975, and 1976. This is far below the 34-car average which raises a presumption that the public convenience and necessity does not require maintenance and/or continued operation of the line in question, 49 CFR 1121.23. Even if consideration is given to the bridge traffic of 1976, the most recent 12 months, the average is only 21.4 cars per mile per year, which still permits the presumption to be made. Once that presumption was established, the burden of going forward with the evidence shifted to protestants.

In their verified statement, protestants concentrated on attacking the evidence submitted by ICG. However, the statement of Congressman Simon includes letters from the Board of County Commissioners of Union County (Board), the Jonesboro Community Consolidated Schools (Schools), and Illinois Minerals Co. None of

these letters were verified nor were they in response to the order directing modified procedure. Further, Schools and the Board were made parties to this proceeding but failed to file verified statement in opposition. Finally, the evidence in these letters are of questionable value even if considered. The Board states that Union County farmers could ship by rail and that the abandonment would reduce the possibility of any industry locating in the area. School states that Koppers, Inc., has a mill near the track and could utilize rail transportation as could the area farmers if ICG sought them out to provide service. Illinois Minerals Co. states that the alternate service to their Elco mill by way of Cairo is satisfactory to them.

Protestants have not submitted testimony from a single shipper served by the track to be abandoned which states that there is a need for the rail service or that such shipper would be hurt by the abandonment. While shipper testimony is not mandatory to rebut the presumption raised at hearing, the remaining testimony falls far short of being sufficient evidence of public need to rebut the presumption raised herein. Since the presumption raised has not been rebutted, there is no need to require ICG to continue operation of this line.

Considering further that in 1974, 1975, and 1976, the branch itself would not have generated sufficient revenue to operate at a profit, we are even more convinced that ICG should be permitted to abandon the subject line.

An environmental threshold assessment survey has been prepared by this Commission and made available for public inspection upon request. The survey has found that no significant impact on the environment would result from approval of the application. By notice served July 29, 1976, it was determined that, based on the aforesaid threshold assessment survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 433, *et seq*. Comments on said determination were received by the Commission. The comments were responded to in an addendum dated November 30, 1976. By notice served December 7, 1976, the public was informed that the comments submitted had not caused the Commission to modify its previous determination. We have considered the threshold assessment survey as part of the record herein, and we find that the economic advantages to be gained from the abandonment permitted herein outweigh any adverse environmental factors.

The threshold assessment survey further notes that most of the right-of-way underlying the track to be abandoned lies within or adjacent to the Shawnee National Forest. Interest has been expressed in acquiring the right-of-way as an addition to the National Forest or alternatively, for use as a bike-way. Accordingly, our approval herein shall be appropriately conditioned.

We note also that, although section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, insofar as it applies to labor protective conditions, is not specifically applicable to this proceeding, it is an expression of the congressional desire that, in the future, employees adversely affected by railroad abandonments should receive the same degree of protection as established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act. In light of that, we believe that it would be appropriate, at this time, to impose the provisions of section 405 of the Rail Passenger Service Act as a supplement to the labor protective condition ordinarily imposed in abandonment cases. See the decision and order of division 3, dated November 16, 1976, in No. AB-26 (Sub-No. 9), *Southern Railway Company Abandonment of Operations Between Atlanta Junction, Ga., and Piedmont, Ala.*

We find that, subject to the condition that employees shall be entitled to the protection provided in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, and the applicable provisions of section 405 of the Rail Passenger Service Act (45 U.S.C. 565), the present and future public convenience and necessity permit the abandonment by the Illinois Central Gulf Railroad Company of the line of railroad extending from milepost 518 near Elco, Ill., to milepost 554 near Murphysboro, Ill.; *provided, however*, that the Illinois Central Railroad Company shall keep intact all of the right-of-way, and bridges and culverts on the right-of-way, for a period of 120 days following issuance of the certificate for the purpose of permitting any responsible person or public authority to offer to purchase all or a part of such right-of-right for public use.

It is ordered, That in the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first class mail to all parties of record and the Commission;

It is further ordered, That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being

considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 FR 13691, and such information shall be made available in the manner described therein;

It is further ordered, That if the authority granted in this order is not exercised within 1 year from the date the certificate of abandonment is issued it shall be of no further force and effect;

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That this order shall be effective 20 days from the date of service.

By the Commission, Review Board Number 5.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

[Service Date Dec 21 1977]

ORDER

INTERSTATE COMMERCE COMMISSION

Docket No. AB-43 (Sub-No. 16)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN ELCO AND MURPHYSBORO IN ALEXANDER, UNION AND JACKSON COUNTIES, ILLINOIS

We have considered the record in the above entitled proceeding, including the report and order of the Commission, Review Board Number 5, served August 8, 1977 finding that the present and future public convenience and necessity permit the abandonment by the Illinois Central Gulf Railroad Company (ICG) of the line of railroad extending from milepost 518 near Elco, Illinois to milepost 554 near Murphysboro, Illinois; the "Appeal" constituting a joint petition for administrative review filed August 29, 1977, by the People of the State of Illinois and the Illinois Commerce Commission, and John W. McGinness, Illinois Legislative Director for United Transportation Union, and the reply filed September 12, 1977 by the applicant. Our judgment is that the Board's conclusion is correct and should be affirmed. However, we are of the view that there should be an amplification of the reasons for the Board's decision.

Preliminarily, in its eighth ground for reconsideration protestants state that the Review Board erred in not consolidating the instant proceeding with the proceedings in Nos. AB-43 (Sub-No. 27) and AB-11. To put this contention in proper context, in its statements in opposition filed May 16, 1977 to the application when it was pending before the Board,

protestants pointed out in part that the applicant's witnesses show "that the crew serving the Murphysboro-Elco line also serves Marion as part of its duties. Yet the Seely-Mande Service of I.C.G. is proposed to be abandoned in Docket No. AB-43 (Sub-No. 27). Thus the proposed abandonment of the Murphysoboro-Elco line, if accomplished, might facilitate the abandonment of the Seely-Mande line and vice-versa. Consolidation of the two proceedings would be appropriate, and is required by the public interest." At that time, protestants also pointed out that the Missouri Pacific Railroad Company (Mopac) proposed to abandon its line serving Tamms, Illinois in No. AB-11 and suggested that the instant I.C.G. proceeding be consolidated with the Mopac case, the reasoning apparently being that Tamms, Illinois was also being served by the subject line. In disposing of this contention, the Board in its Report and Order stated that it did not believe that the issues presented herein are closely enough related to those in the other docketed cases mentioned to justify further delay through consolidation for decision. We wish to add that the Commission's right to consider an application separately or in combination with other applications is a well established matter of administrative discretion. *Alterman Transport Lines, Inc., Extension-Hasting, Nebr.*, 94 MCC 421, 423 (1964). We believe that the Board was clearly correct in exercising its discretion as it did. The request in the first instance was based on the sheer speculation that abandonment in this proceeding would lead to abandonment in No. AB-43 (Sub-No. 27). Moreover there are over 20 protestants in No. AB-43 (Sub-No. 27) and consolidating that proceeding, which has been set for oral hearing, with the subject application, would merely serve to complicate unnecessarily the record. With regard to the abandonment in No. AB-11, there is no sound reason for consolidating the more recently filed application herein with a considerably older proceeding. Tamms will

still have rail service if both abandonment applications are granted, since service will be provided over an alternate route.

The Board's order correctly states the history of the proceeding, which in effect involves an application filed under then extant Subpart B of the Commission's regulation (34 carload rule) 49 CFR 1121.20.24[1]. Protestants charge that the Board erred in considering the 34 carload presumption to be applicable after an abandonment is assigned for hearing, citing *Commonwealth of Pennsylvania v. United States*, 361 F. Supp. 208 (M.D. Pa. 1973) aff'd *per curiam*, 414 U.S. 1017 (1973). Since the effect of the so called 34 carload rule was argued at length by protestants, it will be well to state our view of that particular rule. In *Marianna and Blounstown Abandonment Between Marianna and Blounstown, Fla.*, 348 I.C.C. 507, 510 (1976) we stated the following:

> "In Ex Parte No. 274 (Sub-No. 1), *Abandonment of Railroad Lines*, affirmed *sub-nom, Pennsylvania et al v. United States* 361 F. Supp. 208. . . [*cited above*], the Commission determined that a rebuttable presumption in favor of abandonment is created when fewer than 34 carloads of traffic

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[1] Subsequent to the filing of this application we promulgated revised abandonment regulations in *Ex Parte 274* (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service* (served November 10, 1976) (unreported). At pg. 7 of our report we stated that "(i)n view of the cost and revenue standards being adopted here, there is no longer any necessity to rely on the 34-carload rule. It will not, therefore, be retained for any purpose." Consequently, we believe that the 34-carload rule still applies in those situations where, as here, evidentiary submissions were made under the old regulations. 49 CFR 1121.

per mile are carried over a line during the year proceeding the filing of an application. . ." "The 34-carload rule does not shift the burden of persuasion which remains with the carrier as the party claiming affirmative relief. Its effect is merely to shift to the protestants the burden of going forward with the evidence. *Commonwealth* decision, *supra.* Applicant's evidence of fewer than 34 carloads of traffic per mile creates a rebuttable presumption in favor of abandonment. An opposing party can refute this presumption by evidence showing that there were, in fact, more than 34 carloads of traffic per mile per year carried over the line sought to be abandoned or that the benefits to a particular community or shipper or to several communities or shippers of the continued operation outweighs the burden upon the carrier and interstate commerce. Stated otherwise, the Commission must balance the immediate and local interests of the community and shippers against the burden imposed upon the carrier and interstate commerce if operations continue. See *Colorado v. United States,* 271 U.S. 153 (1926), and *State of Nebraska v. United States,* 255 F. Supp. 718 (Nebr. 1966).

Although our reading of the Board's decision fails to indicate an inconsistent view concerning the 34 carload rule, in light of protestant's argument, the above amplification was deemed necessary. We now turn to the Board's decision and protestant's appeal in light of that amplification of the effect of the rule.

The decision states in part (p. 5):

> "The evidence of record indicates that the line to be abandoned handled an average of less than two carloads per mile annually in 1974, 1975 and 1976. This is far below the 34-car average which raises a presumption that the public convenience and necessity does not require maintenance and/or continuing operation of the line in question. . . Even if consideration is given to the bridge traffic of 1976, the most recent 12 months, the average is only 21.4 cars per mile per year, which still permits the presumption to be made. Once that presumption was established the burden of going forward with the evidence shifted to protestant."

The Board then discussed the protestants' evidence and stated:

> "While shipper testimony is not mandatory to rebut the presumption raised at hearing, the remaining testimony falls short of being sufficient evidence of public need to rebut the presumption raised herein. Since the presumption raised has not been rebutted, there is no need to require ICG to continue operation of this line."

However, the Board being aware of the *Pennsylvania* case went on to state that "considering further that in 1974, 1975 and 1976, the branch itself would not have generated sufficient revenue to operate at a profit, we are even more convinced that ICG should be permitted to abandon the subject line." Applicant's witness W. J. Harlannert, manager of service contracts and regulatory costing for ICG, in his verified statement testified that the current operation of the line produced losses of $40,639 in 1974, $33,371 in 1975, and $6,245 in 1976. He showed that the line would require a rehabilitation expense of $777,600 and that the amount of the subsidy required for the continued operation to be $1,174,429.

He also testified that the only point on the line generating local traffic is Jonesboro, which is only one mile by highway from Anna, a point on ICG's main line. Finally this witness testified that normalized maintenance of way and structures is estimated to be $126,000 per year.

ICG witness Bernard Post, Division Manager stated that there is an average of 1,200 totally deteriorated ties per mile and the right of way is overgrown with brush. None of the above described testimony was successfully rebutted. Thus it is not only the fact that the applicant carried less than 34 carloads of traffic per mile over its line, but it is also obvious that continuance of the line would be a burden on the carrier and on interstate commerce.

Protestants' next charge is that the Board erred in excluding bridge traffic in the computation of movements under the 34 carload rule. The Board's decision has been reviewed in this regard and we find that its decision and disposition of the matter of bridge traffic was adequate and proper. It pointed out that while information concerningf bridge traffic was asked to be filed in a "34 carload" per-mile per-year application, the fact that it was not done in this case is not fatal. The Board reasoned that since Elco and Tamms will be served by an alternate route as explained earlier, bridge traffic generated at these two points is not relevant here. This reasoning in turn was based upon the fact that use by a carrier of an alternate route for bridge traffic is a matter of managerial discretion, *Missouri Pacific R. Co. Abandonment*, 324 I.C.C. 357, 366 and on the fact that continued operation of a line should not be required merely because of bridge traffic that can be handled as expeditiously over another route, *Gainsville Midland R. Co. Abandonment* 267 I.C.C. 256, 262. Protestants, however, quarrel with the applicability of the doctrine of managerial discretion where,

as here, a railroad proposes to reopen a closed branch line so as to continue handling certain business, citing an initial decision in No. AB-7 (Sub-No. 20).[2]

While the doctrine of "managerial discretion" should not be and in fact is not accorded immunity from Commission scrutiny, we are of the view that deference to such discretion was not unreasonably applied in this instance. See *Southern Pacific Company Abandonment* Between Shiner and Kennedy, Tex., 317 I.C.C. 489, 493 and cases cited therein. Protestants apparently see some inconsistency in the Board's stating that on the one hand bridge traffic information is required to be filed in a so called 34 carload rule application, but on the other finding that failure to file such information given the circumstances described is not fatal. We see no such inconsistency and are of the view that the Board's disposition of the matter was correct.

Protestants charge that ICG submitted its data to establish the 34 carload presumption for the year 1976 but that the 12 months "preceding the filing of the application" in this instance is the full year 1975 as the application was filed January 19, 1976. Protestants are in error. As recited in the Board's decision, the application was filed January 19, 1976 under Subpart C of the Commission's Abandonment Regulations, 49 CFR sections 1121.30-35. However, in an order served March 1, 1977 Appellate Division 3, directed ICG to supply all of the information normally

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[2] *Chicago, Milwaukee, St. Paul and Pacific Railroad Company Abandonment Between Waukesha and Whitewater in Waukesha, Jefferson and Walworth Counties, Wisconsin,* which was adopted by decision and order of Review Board No. 5 on January 10, 1977, and applicant's petition for reconsideration was denied by the Commission on May 31, 1977.

included in an abandonment application filed under Subpart B of the Commission's regulations, 49 CFR 1121.20-24, in its verified statements. Thus applicant's Subpart B application was in effect not perfected until 1977 (the time of the Appellate Division 3 order) and in that circumstance ICG's traffic data for the year 1976 was the most relevant. Therefore, we see no Board error in this regard. In its statements applicant showed all the traffic handled locally on the line in 1974, 1975 and 1976, and included bridge movements for the year 1976. On the basis of our review, we conclude that applicant has satisfied the requirements of the rule.

Next protestants urge that the abandonment would be inconsistent with statements made in *Illinois Cent. Gulf R. Acquisition-G, M & O, et al,* 338 I.C.C. 805, 890 (1971). There the following statement was made:

> "4. Cairo-Tamms, Ill: Central and Gulf each have facilities on both sides of the Ohio River at and near Cairo. A track connection would be constructed at the south end of Central's trackage at Cairo, for the purpose of permitting the merged company to service industries located on Gulf tracks, as well as those located on Central's. At Tamms, about 16 miles north of Cairo, Gulf has a yard used for the interchange of traffic with the C&EI. Under the rerouting contemplated as a result of the merger, most of the yard work at Tamms would be eliminated because only one freight train per day in each direction would operate through Tamms.
>
> The proposed new connection at Cairo would eliminate the need for Gulf's track extending from its downtown yard to Davis Junction at North Cairo, including the yard at Davis Junction. Gulf's

> track scale near the downtown area would be used by Central Gulf thus permitting retirement of Central's scale. The freight agency of Gulf at Cairo would be consolidated into Central's existing agency yard office. About 5.1 miles of track, together with surplus buildings would be retired. At Tamms, retirement would involve 7.9 miles of yard track and Gulf's shop facilities excluding sand and fueling facilities."

Protestants apparently translate the above statements into a commitment in perpetuity by ICG. In response applicant argues that the 1971 statement speaks in terms of one freight train per day through Tamms and that is entirely consistent with its proposed operation of trains between Cairo and Elco via Tamms. We agree, and add that we must examine abandonment applications in light of current facts rather than 1971 facts.

Lastly protestants argue that the Board erred in not considering certain letters when it made its evaluation. Specifically referred to are letters from the Board of County of Commissioners of Union County, Jonesboro Community Schools and Illinois Minerals Co. We have reviewed and considered each letter separately.

The Board of County Commissioners of Union County in a letter dated March 8, 1976 object to the abandonment on the ground that "farmers in this area could ship grain and other farm products by rail if given cars and the opportunity, and if removed it would reduce the possibility of any industry locating in this area thereby reducing the capabilities of growth or prosperity." While the remarks of the Board are appreciated, they are not supported by testimony from such farmers or from industries proposing to locate there which allegedly would be adversely affected.

The Jonesboro Community Consolidated Schools stated that the "potential for future community development would be curtailed through discontinuance of the railroad. At present Koppers, Inc. has a mill near the track and could utilize railway transportation if suitable service could be arranged. The community is suited to farming, hence the whole realm of agri-business could be expanded through proper sales and service." Again while the remarks of the Schools are appreciated, we cannot deny a railroad abandonment application based on mere hopes for the future.

Protestants quoted the letter from the Illinois Minerals Co. which we have also considered. However with regard to the letters we must say that "a mere possible need for railroad service at some indefinite time in the future is insufficient ground for denying permission to abandon an unprofitable line," *New York Central R. Co. Abandonment*, 282 I.C.C. 283, 289 (1952).

The evidence in this proceeding shows a line of track in poor condition which has very minimal car movements, that the revenue obtained from such movements is miniscule given the cost of maintenance and rehabilitation, that constant deficits have been incurred on the line and that there is no substantial showing that actual traffic movements over the segment will increase in the forseeable future. The Board's finding that public convenience and necessity permit the proposed abandonment was therefore in order.

The findings and conclusions of the Review Board with respect to all matters of fact and law disposed of in its report and order as amplified herein are in all material respect proper and correct.

No good cause or changed circumstances have been presented which would warrant further hearing in the above

entitled matter. The decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Wherefore and good cause appearing therefore:

We find:

1. The evidence considered in the light of the pleadings does not warrant a result different from that reached by the Review Board.

2. The statement of facts, the conclusions and the findings of the Review Board, as amplified herein, being proper and correct in all material respects, should be and they are hereby affirmed and adopted as our own.

3. The conditions for protection of employees shall be those as discussed in *Oregon Short Line R. Co.–Abandonment–Goshen*, 354 I.C.C. 76 (1977).

It is ordered that:

1. The appeal from the report and order of the Commission, Review Board Number, 5 served August 8, 1977 is denied.

2. The order served August 8, 1977 as amplified herein shall be effective 20 days from the date this order is served.

Decided December 12, 1977.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, Clapp and Christian, Commissioner Christian absent and not participating.

H. H. HOMME, JR.
Acting Secretary

(SEAL)

[Service Date Feb 23 1978]

INTERSTATE COMMERCE COMMISSION

ORDER

Docket No. AB-43 (Sub-No. 16)

ILLINOIS CENTRAL GULF RAILROAD COMPANY– ABANDONMENT – BETWEEN ELCO AND MURPHYSBORO, IN ALEXANDER, UNION, AND JACKSON COUNTIES, ILLINOIS

We have considered the record in this proceeding, including the petition of protestants, the State of Illinois, the Illinois Commerce Commission, and John W. McGinness, filed January 4, 1978, which seeks a finding that an issue of general transportation importance is involved, and the reply to the petition filed by applicant, Illinois Central Gulf Railroad Company on January 23, 1978. We find that no issue of general transportation is involved in this proceeding. Nevertheless, the labor protective conditions imposed in this proceeding will be subject to any modification ultimately ordered in *Oregon Short Line R. Co. Abandonment – Goshen,* 354 I.C.C. 76 (1977).

This decision does not significantly affect the quality of the human environment.

It is ordered:

1. The petition is denied.

2. The order served August 8, 1977, as amplified by

the order served December 21, 1977, shall become effective 20 days from the date this order is served.

Decided February 9, 1978.

By the Commission.

H. G. HOMME, JR.
Acting Secretary

(SEAL)